SHAHABUDIN ABDUL RASHID

v.

TALASCO INSURANCE SDN BHD

COURT OF APPEAL, PUTRAJAYA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-04-51-1997]
15 OCTOBER 2004

LABOUR LAW: *Employment - Dismissal - Constructive - Test to be applied - Contract test - Whether worker's terms of employment fundamentally altered - Whether employer evinced intention not to be bound by contract of employment - Reorganisation of business, legitimacy and mala fides - Administrative changes, redesignation and demotion - Whether worker could treat himself as having been dismissed constructively*

This was an appeal by the appellant/claimant from the decision of the High Court allowing an application by the respondent/company to set aside Industrial Court Award No. 512 of 1994 ('the said award') which had earlier been handed down in favour of the claimant. By the said award, the Industrial Court had held that the claimant was dismissed without just cause or excuse, constructively, and had therefor awarded him compensation and backwages *in lieu* of reinstatement. In issuing *certiorari* to quash the said award, the High Court had disagreed with the following findings of the Industrial Court, namely, that: (i) there was *mala fides* in the company's reorganisation exercise which resulted in the claimant being demoted in rank; and (ii) the cumulative conduct of the company was unfair and unreasonable, and had amounted to a unilateral variation of the contract of employment thereby entitling the claimant to treat himself as having been dismissed constructively.

Before the justices of appeal herein, the sole issue that arose for decision centred on the correct test that is to be applied when a workman represents, under s. 20(1) of the Industrial Relations Act 1967, that he has been dismissed without just cause or excuse.

Held (dismissing the appeal)
Per Siti Norma Yaakob JCA delivering the judgment of the court:

[1] The true test to be applied here was the 'contract test', namely: whether the company's conduct in reorganising its business was such as to amount to a fundamental breach of the terms of the claimant's contract of employment, thereby, evincing an intention, on the part of the company, not to be bound by the contract anymore. Or in other words: whether there had been a unilateral repudiation of the contract of employment by the company thereby entitling the claimant to treat himself as having been dismissed constructively. (p 518 c-f)

[2] The evidence led showed that the company had to be restructured as it was running into debts and was faced with the prospect of winding up the business and retrenching its employees. Thus, the reorganisation exercise had more legitimacy to it than it had any *mala fides*. Indeed, even after the reorganisation, the complainant was still gainfully employed and drawing the same salary. The only difference was that he was redesignated from 'chief accountant' to 'accountant (corporate)'. Consequently, the High Court was correct in its conclusion that the administrative changes undertaken by the company did not have the effect of breaching the fundamental terms of the claimant's contract of employment. The Industrial Court was wrong to have concluded that they did. (pp 518 g-h & 519 a-b)

[Decision of High Court affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh perayu/penuntut terhadap keputusan Mahkamah Tinggi membenarkan permohonan responden/syarikat untuk mengetepikan Award Mahkamah Perusahaan No. 512 Tahun 1994 ('award tersebut') yang diberikan dengan berpihak kepada penuntut sebelumnya. Mahkamah Perusahaan, melalui award tersebut, telah memutuskan bahawa penuntut telah dibuang kerja secara konstruktif tanpa sebab dan alasan yang sah, dan telah mengaward pampasan dan gaji tertunggak sebagai ganti pengambilan semula. Mahkamah Tinggi, sewaktu mengeluarkan *certiorari* bagi membatalkan award tersebut, telah tidak bersetuju dengan dapatan-dapatan Mahkamah Perusahaan yang berikut, iaitu, bahawa: (i) wujud *mala fide* pada penyusunan semula organisasi oleh syarikat sehingga menyebabkan penuntut diturunkan pangkat; dan (ii) kelakuan syarikat secara kumulatifnya adalah tidak munasabah dan tidak adil serta membawa kepada perubahan kontrak pekerjaan secara sebelah pihak, sekaligus memberikan hak kepada penuntut untuk menganggap dirinya sebagai telah dibuang kerja secara konstruktif.

Dihadapan yang arif hakim-hakim rayuan di sini, isu tunggal yang timbul untuk keputusan adalah, apakah ujian sebenar yang harus dipakai apabila representasi dibuat oleh seorang pekerja di bawah s. 20(1) Akta Perhubungan Perusahaan 1967 bahawa beliau telah dibuang kerja tanpa alasan yang munasabah atau adil.

Diputuskan (menolak rayuan)
Oleh Siti Norma Yaakob HMR menyampaikan penghakiman mahkamah:

[1] Ujian sebenar yang harus dipakai di sini adalah 'ujian kontrak', iaitu: sama ada kelakuan syarikat dalam menyusun semula perniagaannya adalah sebegitu rupa sehingga melanggar secara fundamental terma-terma kontrak pekerjaan, sekaligus menunjukkan niat di pihak syarikat untuk tidak terikat lagi dengannya. Atau dengan lain perkataan: sama ada telah berlaku pembatalan kontrak pekerjaan oleh syarikat secara sebelah pihak sekaligus menjadikan penuntut berhak untuk menganggap dirinya sebagai telah dibuang kerja secara konstruktif.

[2] Keterangan yang ada menunjukkan bahawa syarikat menanggung banyak hutang dan perniagaannya berhadapan dengan risiko penggulungan serta pembuangan pekerja dan kerana itu perlu distrukturkan semula. Maka itu, terdapat alasan yang kuat untuk penyusunan semula berbanding dengan kewujudan *mala fide*. Malah, walaupun selepas penyusunan semula, pengadu masih lagi bekerja dengan syarikat dan dibayar gaji yang sama. Bezanya cumalah bahawa beliau diberi jawatan baru dari 'ketua akauntan' kepada 'akauntan (korporat)'. Mahkamah Tinggi dengan itu betul dalam rumusannya bahawa pertukaran pentadbiran yang dibuat oleh syarikat tidaklah sampai ke tahap melanggar secara fundamental terma-terma pekerjaan pengadu. Mahkamah Perusahaan pula silap apabila mengatakan bahawa terma-terma tersebut telah dilanggar dengan cara itu.

Keputusan Mahkamah Tinggi disahkan.]

Case(s) referred to:
Holiday Inn, Kuching v. Lee Chai Siok Elizabeth [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(foll)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1)

For the appellant - P Kuppusamy (KC Wong); M/s P Kuppusamy & Co
For the respondent - VK Lingam (R Thayalan); M/s VK Lingam & Co

[Appeal from High Court, Kuala Lumpur; Originating Motions No: R1-25-141-1994]

Reported by Gan Peng Chiang

JUDGMENT

Siti Norma Yaakob JCA:

In this wrongful dismissal suit the facts surrounding the appellant's employment with the respondent are not disputed and these are sufficiently set out in the judgment of the High Court. What is disputed is his claim that he had been constructively dismissed without just cause or excuse.

The Industrial Court agreed with him and in its Award No. 512 of 1994, dated 17 November 1994 ordered that the respondent pay the appellant compensation and backwages in lieu of reinstatement. The Industrial Court also made a subsequent Rectification Award dated 12 December 1994 stipulating the period when payment of the compensation and backwages was to be made.

The respondent sought to quash both awards by way of an order for *certiorari* and they succeeded in the High Court and also obtained an order of costs against the appellant. Hence the present proceedings by the appellant to set aside the High Court orders and to restore the awards of the Industrial Court.

Before us only one issue was taken namely the test that should be applied when a workman is dismissed without just cause or excuse under s. 20(1) of the Industrial Relations Act 1967. In the Industrial Court, the appellant had claimed that as a result of a re-organization exercise undertaken by the respondent, he was demoted in rank

(1) as the post of Chief Accountant which he headed in the Accounts Division previously was redesignated as Accountant (Corporate).

(2) as he had to report to the Senior Manager, Finance and Administration, a post filled by a newly recruited officer who was placed in the same salary grade as him.

(3) as he was asked to move into a smaller room.

(4) as his former subordinates were no longer reporting to him.

(5) as he had to perform duties previously assigned to his subordinates.

(6) as he was not informed of the redesignation and change of work.

Based on the six complaints the Industrial Court held that the re-organization of the respondent was made *mala fide* and that the respondent's cumulative conduct is unfair and unreasonable and amounted to there being a unilateral variation of the contract of employment entitling the appellant to treat himself as being constructively dismissed by the respondent.

The High Court disagreed with the Industrial Court as the latter had asked the wrong question for the real issue was whether there has been a change in the terms and conditions of the appellant's employment which worked to his disadvantage as a result of the re-organization.

We confirm this to be the true test as the employer's conduct in reorganizing the business must be such as to amount to there being a breach of some term in the appellant's contract of employment and must be so fundamental as to envince an intention not to be bound by the contract of employment. Expressed in another way has there been a unilateral repudiation of the contract of employment by the respondent as to entitle the appellant to claim that he has been constructively dismissed? The test is definitely the contract test and the law on this is well settled. See the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 which was followed in *Holiday Inn, Kuching v. Lee Chai Siok Elizabeth* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521.

To come back to this appeal it is necessary to look at the reason for the re-organization. Was it done *mala fide* as found by the Industrial Court or for a legitimate purpose as found by the High Court?

There is evidence to show that the re-organization was necessary as the respondent was running into debts and was faced with the prospect of winding its business and retrenching its employees. To avoid taking that drastic action the respondent decided to reorganize itself and make itself more viable and profitable. That was the only practical solution that the respondent could take and in this way it was possible to retain the employees and as such the appellant had no cause to complain as he was still gainfully employed and there was no change in his duties following the re-organization. Likewise he was paid the same salary and perks previously enjoyed by him.

The only change perhaps was in the redesignation of his post as he was no longer known as the Chief Accountant but as Accountant (Corporate). He also had to report to a new Head his immediate superior in the newly organized department, and someone who was newly recruited. He also resented the fact that he was put in a smaller room and accumulatively he maintained that these factors amounted to a demotion. The High Court disagreed and we support that finding as these changes were administrative changes following the re-organization and do not have the effect of breaching any term of the appellant's contract of employment – at least there was no evidence pointing to such a conclusion. His other complaints are too trivial to amount to there being any breach of any term of his contract of employment.

We do not see any merits in this appeal and it is accordingly dismissed with costs and the deposit is to be paid out to the respondent to account of its taxed costs.